UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

PAUL IWUCHUKWU	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324b Proceeding
	)	OCAHO Case No. 95B00144
CITY OF GRAND PRAIRIE	)	
Respondent.	)	

ORDER TO DISMISS IN PART AND TO INQUIRE FURTHER
(December 2, 1996)

I. PROCEDURAL HISTORY

On March 3, 1995, Paul Iwuchukwu (Iwuchukwu or Complainant) filed a charge dated February 27, 1995, in the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). The charge alleged that the City of Grand Prairie, Texas (Grand Prairie or Respondent) discriminated against Iwuchukwu by not hiring him for the position of Traffic Engineer even though he met all the required qualifications for the position.

By determination letter dated July 19, 1995, OSC informed Iwuchukwu that it "has determined that there is insufficient evidence of reasonable cause to believe you were discriminated against as prohibited by 8 U.S.C. § 1324b." OSC stated that, therefore, it would not file a complaint on Iwuchukwu's behalf, but that he might file a private action within ninety (90) days in the Office of the Chief Administrative Hearing Officer (OCAHO).

On October 16, 1995, Iwuchukwu filed his Complaint against Grand Prairie alleging citizenship status and national origin discrimination in violation of § 102 of the Immigration Reform and Control Act (IRCA), as amended, 8 U.S.C. § 1324b. Specifically, Complainant alleges that he "met and exceeded all the requirements for the position" listed in Respondent's employment advertisement. Iwuchukwu contends that he "learned that the position was awarded to one of their employees who do [sic] not meet the minimum requirement prescribed [sic] in the job announcement."

On December 5, 1995, OCAHO issued a Notice of Hearing (NOH) which transmitted a copy of the Complaint to Respondent. In addition, the NOH warned the parties that all proceedings or appearances would be conducted in accordance with OCAHO rules of practice

and procedure, 28 C.F.R. pt. 68, a copy of which was enclosed with each party's copy of the NOH.

On March 7, 1996, Respondent filed a "Response to Notice of Hearing" as its answer to the Complaint. Respondent denied that it discriminated against Iwuchukwu. Respondent acknowledged that Complainant was a finalist for the position of Traffic Engineer, but was denied the position because another candidate had more "direct leadership experience within the structure of the City of Grand Prairie, and a factor in his favor was that he was hired from within, and not a new hire." Answer, ¶ VIII.

On April 15, 1996, Complainant filed a gratuitous letter/pleading dated April 4, 1996. Complainant detailed alleged "misrepresentations, distortions, and outright lies" in Respondent's filing. Iwuchukwu also related an incident in which he allegedly overheard Russell Fox, a Grand Prairie engineering technician, and another employee talking on the phone "about the possibility of a black man from Africa coming to supervise them." Response of Complainant to Respondent's Response to the Complaint, April 4, 1996, ¶ 7.

In response, Respondent on May 3, 1996, filed its own gratuitous letter/pleading, denying discrimination and offering to provide information identifying employees who were not born in the United States. Stating an inability to articulate exactly why Complainant was not hired, Respondent suggested that perhaps its interviewers had sensed a side to Iwuchukwu, now revealed in his April 4, 1996 letter, which was a basis for not hiring him for the Traffic Engineer position.

On May 24, 1996, Complainant, again gratuitously, responded to Respondent's letter/pleading, reiterating that the basis for his citizenship status discrimination claim related to the conversation among the Grand Prairie employees who discussed the possibility of a black man from Africa in a supervisory position.

By Order of Inquiry issued June 6, 1996, I asked the parties to comment on two threshold jurisdictional issues. The Order invited the parties to comment on the viability of Complainant's national origin discrimination charge and to discuss state sovereign immunity in light of Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996); Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505 (10th Cir. 1994), reh'g denied (Nov. 21, 1994), and Kupferberg v. University of Oklahoma Health Services, 4 OCAHO 709 (1994), at 1994 WL 761187 (O.C.A.H.O.), as well as federal and state case law and other sources interpreting the application of the Eleventh Amendment to governmental entities such as Grand Prairie.

The Order of Inquiry directed responses to be filed no later than July 8, 1996. The parties were cautioned that failure to respond might result in a ruling adverse to a nonresponsive party.

On July 3, 1996, Complainant's newly retained counsel requested an extension of time to respond. Complainant filed his Response on July 31, 1996; Respondent filed its Response on August 1, 1996.

II. DISCUSSION AND FINDINGS

A. Complainant's National Origin Claim Is Dismissed Because This Court Lacks Jurisdiction

Complainant alleges discrimination based on national origin. Administrative Law Judges exercise jurisdiction over national origin discrimination claims only where the employer employs more than three (3) and fewer than fifteen (15) employees. 8 U.S.C. § 1324b(a)(2)(B); Huang v. United States Postal Service, 2 OCAHO 313, aff'd, 962 F.2d 1 (2d Cir. 1992) (unpublished); Akinwande v. Erol's, 1 OCAHO 144 (1990); Adatsi v. Citizens & Southern National Bank of Georgia, 1 OCAHO 203 (1990), appeal dismissed, No. 90-8943 (11th Cir. 1991); Bethishou v. Ohmite Mfg., 1 OCAHO 77 (1989); Romo v. Todd Corp., 900 F.2d 1 OCAHO 25 (1988), aff'd, United States v. Todd Corp., 900 F.2d 164 (9th Cir. 1990).

Because, as Complainant concedes in his March 11, 1995 letter to OSC, and Respondent asserts in its Answer, that Grand Prairie employs more than fourteen employees, I find that at all times relevant Respondent employed more than fourteen employees. Therefore, I lack subject matter jurisdiction over Complainant's national origin discrimination claim. That portion of the Complaint alleging national origin discrimination is dismissed. 8 U.S.C. § 1324b(a)(2)(B).

B. This Court Orders Further Inquiry Regarding City of Grand Prairie and State Sovereign Immunity

Complainant also alleges discrimination based on citizenship status. Administrative law judges exercise jurisdiction over citizenship complaints of "protected" individuals, including citizens or nationals of the United States and aliens lawfully admitted for permanent residence. 8 U.S.C. § 1324b(a)(1)(B), § 1324b(a)(3). Grand Prairie does not dispute Iwuchukwu's claim that he was admitted for permanent residence on May 14, 1986, applied for naturalization on March 8, 1994, became a naturalized citizen of the United States on September 30, 1994, applied for the position of Traffic Engineer on July 19, 1994, was interviewed for the position of Traffic Engineer sometime in September 1994, and was subsequently rejected. I find, therefore, that at all times relevant, Complainant was within a class of protected individuals. Therefore, Complainant is protected by § 1324b, and I have subject matter jurisdiction over the Complaint.

However, this does not end the need for a threshold inquiry. Title 8 U.S.C. § 1324b is silent on the subject of state sovereign immunity. In a recent case, the United States Court of Appeals for the Tenth Circuit held that § 1324b does not reach state employees. Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505, 507 (10th Cir. 1994), reh'g denied. Hensel holds that because § 1324b does not waive Eleventh Amendment immunity, such claims

must be dismissed for want of jurisdiction. Id. at 508. More recently, in a case unrelated to § 1324b jurisdiction, the Supreme Court emphasized that Congress can only abrogate Eleventh Amendment immunity to suit in federal court "by making its intention unmistakably clear in the language of the statute." Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114, 1123 (1996) (quoting Dellmuth v. Muth, 109 S.Ct. 2397, 2399-2400 (1989)). No such intention is manifest in § 1324b.

Accordingly, it is necessary to determine: (1) whether Grand Prairie, a municipality, is an arm of the state for purposes of Eleventh Amendment immunity; and (2) even were I to find Grand Prairie an arm of the state under state law, whether the state has waived its immunity to suit in federal court. To make this determination, I am guided by Supreme Court and Fifth Circuit[1] precedent, as well as by state law. If Grand Prairie is not an arm of the state, I have jurisdiction here. To similar effect, if Texas has waived its immunity, I may exercise jurisdiction.

As explained below, on the basis of Supreme Court and Fifth Circuit authority, I am prepared to conclude that Grand Prairie cannot successfully defend on the basis of the Eleventh Amendment. However, before doing so with finality, I will invite Grand Prairie to make a showing of those factors the Fifth Circuit has enumerated as demonstrating state sovereign immunity.

1. Supreme Court Precedent

The Eleventh Amendment to the United States Constitution divests federal courts of jurisdiction in suits against states. Port Auth. Trans-Hudson Corp. v. Feeney, 110 S.Ct. 1868, 1871 (1990); Green v. State Bar of Tex., 27 F.3d 1083, 1087 (5th Cir. 1994); Hockaday v. Texas Dept. of Criminal Justice, Pardons and Paroles Division, 914 F. Supp. 1439, 1444 (S.D.Tex. 1996).

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S.C.A. Const. Amend. XI. While the amendment literally only addresses suits by a citizen of a state other than that against which relief is sought, the Supreme Court has extended this prohibition to suits by all persons against a state in federal court. Port Auth. Trans-Hudson Corp., 110 S.Ct. at 1871; Pennhurst State School and Hospital v. Halderman, 104 S.Ct. 900, 907 (1984); Employees v. Missouri Dept. of Public Health and Welfare, 93 S.Ct. 1614, 1615 (1973).

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[1] 8 U.S.C. § 1324(b)(i)(1) provides that a party may seek review of a § 1324b case "in the United States court of appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business."

There are two judicially recognized exceptions to this jurisdictional bar. First, Congress may abrogate state sovereign immunity. Port Auth. Trans-Hudson Corp., 110 S.Ct. at 1871; Dellmuth v. Muth, 109 S.Ct. 2397 (1989). Secondly, states may consent to suit in federal court. Port Auth. Trans-Hudson Corp., 110 S.Ct. at 1871; Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142, 3146 (1985); Clark v. Barnard, 2 S.Ct. 878, 882 (1883).

Although it is well-established that state agencies and entities may be understood to act as the state's alter-ego so as to benefit from state sovereign immunity,[2] the Supreme Court has held, in an unbroken chain of cases beginning in 1890, that political subdivisions such as counties and cities do not ordinarily obtain Eleventh Amendment immunity.

For example, in Lincoln v. Luning, the Court held Nevada counties liable to suit because "the eleventh amendment limits the jurisdiction [of circuit courts] only as to suits against a state." 133 U.S. 529, 530 (1890). And in Mt. Healthy City School District Board of Education v. Doyle, the Court rejected a municipal school board's assertion of Eleventh Amendment immunity, holding that "the bar of the Eleventh Amendment . . . does not extend to counties and similar municipal corporations." 97 S.Ct. 568, 572 (1977). In Monell v. Dept. of Social Services of New York City the Court held municipalities and local governing units liable to suit under 42 U.S.C. § 1983 where official municipal policy causes a constitutional tort. 98 S.Ct. 2018, 2035-2036 (1978) (overruling Monroe v. Pape, 81 S.Ct. 473 (1961)).

Again, in City of Lafayette, Louisiana v. Louisiana Power & Light Co., declaring that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them," the Court held municipalities to be among those "persons" subject to federal antitrust laws. 98 S.Ct. 1123, 1135 (1978). The Court also observed in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency that it had "consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a 'slice of state power.'" 99 S.Ct. 1171, 1177 (1979). "By its terms, the protection afforded by that Amendment is only available to 'one of the United States.'" Id. at 1176.

In Owen v. City of Independence, Missouri, 100 S.Ct. 1398, 1407, 1413-415 (1980), reh'g denied,[3] the Court denied a municipality immunity from liability for 42 U.S.C. § 1983 due process violations. Because § 1983 failed to specify any privileges, immunities, or defenses, the

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[2]Frank H. Julian, The Promise and Perils of Eleventh Amendment Immunity in Suits Against Public Colleges and Universities, 36 S.TEX.L.R. 85 (1995).

[3]Limiting the reach of §1983, the Supreme Court in 1989 held that § 1983 did not abrogate state immunity, but refused to extend such immunity to cities. Will v. Michigan Dept. (Continued)
of State Police, 109 S.Ct. at 2304 - 2305 (1989).

Court found cities to be within the statute's reach. Id. at 1407. The Court also held that public policy dictates that municipalities be included among those "persons" liable for civil rights violations. "[T]he threat that damages might be levied against the city may encourage those in a policy making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights." Id. at 1415. And the Court found defenses to a federal right of action, including a city's claim of sovereign immunity, to be controlled by federal law. Id. at 1413-14.

The Supreme Court in Owen undertook a textual analysis. By the Court's methodology, broad statutory language -- coupled with silence on the subject of privileges, immunities, and defenses -- means that municipalities are liable in federal courts for civil rights violations. Owen, 100 S.Ct. at 1407.

> Its [the statute's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act [§ 1983] imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities of the Constitution and laws." And Monell [supra] held that these words were intended to encompass municipal corporations as well as natural "persons."

Id.

> [T]he municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. . . . By including municipalities with the class of "persons" subject to violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed.

Id. at 1413-14 (footnote omitted).

Title 42 U.S.C. § 1983 provides:

> Every *person* [emphasis added] who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or

> immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 8 U.S.C. § 1324b reads:

> It is an unfair immigration-related employment practice for a person *or other entity* [emphasis added] to discriminate against any individual . . . with respect to the hiring, or recruitment . . . of the individual for employment . . . because of such individual's citizenship status.

8 U.S.C. § 1324b(a)(1)(B).

The language of 8 U.S.C. § 1324b, like that of § 1983, is both "absolute" and "unqualified." Like § 1983, § 1324b does not specify privileges, immunities, or defenses. Moreover, on its face, § 1324b, but not § 1983, includes "other entit[ies]" among those subject to its mandate. Therefore, § 1324b is even more sweeping in application than is § 1983. It would be consistent with the Supreme Court's rejection in Owen, supra, and Monell, supra, of immunity for municipalities in § 1983 cases to conclude that silence on the subject of immunities and defenses, coupled with § 1324b inclusion of the term "other entity," is sufficiently clear to confirm the enactment of municipal liability.

More recently, in Hess v. Port Authority Trans-Hudson Corp.,115 S.Ct. 394 (1994), a suit under the Federal Employers' Liability Act (FELA) by injured workers, the Court held a bistate employer railway created pursuant to the Constitution's Interstate Commerce Clause subject to suit in federal court. While commenting that the Court historically does not exempt municipalities from federal suit, the Court endorsed the "treasury test" to determine whether an entity is an arm of the state. Id. at 403-404. Under this test, because the Eleventh Amendment's purpose is "prevention of federal court judgments that must be paid out of a State's treasury," the factor determining state agency status is who will pay a judgment against the entity being sued. Id. at 403.

Most recently, the Supreme Court addressed state sovereign immunity from suit in federal court in Seminole Tribe of Florida v. Florida. 116 S.Ct. 1114 (1996). In a suit to compel negotiations under the Indian Gaming Regulatory Act, the Court dismissed a suit against the State of Florida for want of jurisdiction, holding that although Congress made unmistakably clear its intent to abrogate state sovereign immunity, it lacked authority to do so under the Indian Commerce Clause. Id. at 1131.

Taken as a whole, these cases do not support the conclusion that a city is immune from suit under federal statutes, however silent. Furthermore, in its Response to Order of Inquiry, Grand Prairie concedes that it can find no case authority for the proposition "that a city can be

considered a state and claim the umbrella of immunity granted by the 11th Amendment." Response to Order of Inquiry ¶ IV. Rather, Supreme Court precedent clearly establishes that municipalities are amenable to civil rights suits in federal court. Owen, 100 S.Ct. at 1407; Monell, 98 S.Ct. at 2035-2036; Mt. Healthy, 97 S.Ct. at 572. See also Howlett v. Rose, 110 S.Ct. 2430, 2444 (1990) (holding that "Federal law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations," but acknowledging that the state and its arms are immune from the reach of § 1983).

2. Fifth Circuit Precedent

In accord, a recent decision of the Fifth Circuit, the court with appellate jurisdiction over this dispute, is controlling. In Flores v. Cameron County, a § 1983 civil rights case in which it was alleged that a juvenile's death in a county detention center was the result of excessive force, the Fifth Circuit refused to accord a county juvenile probation board Eleventh Amendment immunity from suit. 92 F.3d 258, 263 (5th Cir. 1996), reh'g denied. To determine whether a governmental body is a state or local entity, the Fifth Circuit applied a six-part test:

(1) whether state law views the entity as an arm of the state;
(2) the source of the entity's funding;
(3) the degree of local autonomy retained;
(4) whether the entity is concerned primarily with local, as opposed to statewide, problems;
(5) whether the entity has the authority to sue and be sued in its own name; and
(6) whether the entity retains the right to hold and use property.

Flores, 92 F.3d at 264-265 (citing Stem v. Ahearn, 908 F.2d 1, 4 (5th Cir. 1990), cert. denied, 111 S.Ct. 788 (1991); Clark v. Tarrant County, 798 F.2d 736, 744-745 (5th Cir. 1986), reh'g denied).

To determine whether Texas law views a county juvenile probation board as an arm of the state, the Fifth Circuit considered such sources as that section of the Texas Human Resources Code creating a related state agency, the Texas Juvenile Probation Commission, and found in the Commission's mandate to assist "local authorities," including counties, a clear inference that county juvenile probation boards are not arms of the state. Flores, 92 F.3d at 265. The Fifth Circuit also consulted opinions of the Texas Attorney General on the status of juvenile probation personnel for purposes of the wage and hours requirements of the Fair Labor Standards Act. Id.

Weighing the foregoing factors and relying on Monell, supra, the Fifth Circuit held that "it is well settled that a local governmental body such as Cameron County is liable for damages . . . for constitutional violations resulting from official county policy or custom." Flores, 92 F.3d at 263. At the same time, however, the Fifth Circuit refused to hold a local government liable on the theory of respondeat superior "for the unconstitutional acts of its non-policy making employees."

Id.

Applying the Fifth Circuit's Flores analysis to the present case, I find that I lack sufficient information to guide the preliminary inquiry the circuit demands. For example, I have no informed basis for determining the source of Grand Prairie's funding, degree of local autonomy, breadth of concern, amenability to sue in its own name, and right to hold and use property, five of the six factors the Flores court obliges a trial court to consider.

This inquiry is critical because Texas has expressly reserved state Eleventh Amendment immunity from suit in federal court even when it otherwise authorizes civil suit against itself.[4] The effect of the legislative grant of permission to sue neither waives the state's own sovereign immunity under the Eleventh Amendment nor grants permission to be sued in any federal court. TEX. CIV. PRAC. & REM. CODE ANN. § 107.002(a)(11)(12) ("Effect of Grant of Permission") (West 1996).

However, Eleventh Amendment immunity will not shield Grand Prairie from federal suit unless, under the Flores six-pronged test, Grand Prairie can persuade me that it is a state entity. Flores, 92 F.3d at 264.

Accordingly, this order provides Grand Prairie the opportunity to provide the information a Flores inquiry requires, including:

(1) Grand Prairie's status as "an arm of the state" under Texas statutes and common law;
(2) the source of Grand Prairie's funding;
(3) the degree of autonomy retained by Grand Prairie in its dealings with the State of Texas;
(4) the scope of Grand Prairie's concern with municipal, as opposed to State, problems;
(5) whether Grand Prairie has the authority to sue and be sued in its own name; and
(6) whether Grand Prairie retains the right to hold and use property.

Flores, 92 F.3d at 264-265. Grand Prairie should also provide information required by the Supreme Court "treasury test" to determine whether a political subdivision is entitled to state immunity as an arm of the state -- i.e., who pays judgments against Grand Prairie? Hess, 115 S.Ct. at 403. I also invite Complainant to discuss Grand Prairie's status as an arm of the state in

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[4]"A resolution that grants a person permission to sue the state has the following effect and the permission is granted subject to the following conditions. . . . [T]he state's sovereign immunity under the Eleventh Amendment to the United States Constitution is not waived; and . . . the state does not grant permission to be sued in any federal court." TEX. CIV. PRAC. & REM. CODE ANN. § 107.002(a)(11)(12) (West 1996).

light of these factors.

3. Texas Statutory Authority

Texas consents to suit when employment discrimination is alleged. Applicable to complaints filed on or after September 1, 1993, the Texas Labor Code executes the policies of Title VII of the Civil Rights Act of 1964, as amended, and includes specifically the guarantee "for persons in this state . . . [of] freedom from discrimination in certain employment transactions, in order to protect their personal dignity." TEX. LAB. CODE ANN. § 21.001 (West 1996).

Section 21 explicitly forbids an employer to fail or refuse to hire "because of race, color, disability, religion, national origin, or age," but

> [D]oes not relieve a government agency or official of the responsibility to ensure nondiscrimination in employment as required under another provision of the state *or federal constitutions or laws*.

Id. at § § 21.051, 21.005 ("Effect on Other State or Federal Laws") (emphasis supplied). Absent any reason to conclude otherwise, it appears that Texas governmental agencies are implicitly liable in their official capacity for discriminatory employment practices forbidden by federal and state law. Of course, federal law forbids discriminatory refusal to hire on the basis of citizenship status. 8 U.S.C. § 1324b(a)(1)(B).

This conclusion is consistent with Flores, where the court rejected a county claim of sovereign immunity to § 1983 suit. Although the Texas Labor Code was silent as to specific liability under § 1983, the Fifth Circuit found § 1983 jurisdiction. To the same effect, the Code's silence as to liability under § 1324b is not necessarily a bar to § 1324b jurisdiction.

The Texas Labor Code specifically includes among those governmental employers amenable to suit for discrimination:

> [A] county, municipality, state agency, or state instrumentality, including a public institution of education, regardless of the number of individuals employed.

Id. at § 21.002(8)(D). If successfully sued, "the state, a state agency, or a political subdivision is liable for costs, including attorney's fees, to the same extent as a private person." Id. at § 21.259(b).

The Texas Civil Practices and Remedies Code also renders employees of state and political subdivisions amenable to suit in their official capacities. "An officer or employee of the state or of a political subdivision of a state who is acting or purporting to act in an official

capacity" is prohibited from refusing "to grant a benefit to the person" "because of a person's race, religion, color, sex, or national origin." TEX. CIV. PRAC. & REM. CODE ANN. § 106.001 (West 1996). Knowing violations of § 106.001 are misdemeanors "punishable by (1) a fine of not more than $1,000; (2) confinement in the county jail for not more than one year; or (3) both the fine and confinement." Id. at § 106.003. In such suits, "[T]he state's liability for costs is the same as that of a private person." Id. at § 106.002.

I invite the parties to comment on waiver of sovereign immunity in light of the Texas Labor Code.

4. Texas Common Law

In 1996 the Texas Court of Appeals held the purpose of the Texas Commission on Human Rights Act (TCHRA) to be the promotion of federal civil rights policy. Holt v. Lone Star Gas Co., 921 S.W.2d 301, 304 (Tex. App. 1996), reh'g overruled (1996). "[B]ecause Texas has little case law interpreting the Act [TCHRA]," courts "can look to analogous federal precedent when appropriate." Id. at 304. Given the purpose of the TCHRA, as understood in context of § 21.001 of the Texas Labor Code, i.e., universal compliance with federal civil rights policy, it would appear incongruous to suppose that Texas intended to preserve immunity for its municipalities against liability for violation of federal proscriptions against discrimination.

Indeed, the Fifth Circuit has held that in cases where federal and state laws conflict, federal labor law governs. See Thomas v. LTV Corp., 39 F.3d 611 (5th Cir. 1994) (wrongful discharge claim under Texas Labor Code, held preempted by the Labor Management Relations Act (LMRA)). The court relied on Allis-Chalmers Corp. v. Lueck, 105 S.Ct. 1904, 1915 (1985), which held in pertinent part: "[T]he application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor law principles -- necessarily uniform throughout the Nation -- must be employed to resolve the dispute." In accord, see the subsequent Supreme Court holding that where state sovereign immunity law "reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law." Howlett v. Rose, 110 S.Ct. 2430, 2443.

III. CONCLUSION AND ORDER

The national origin claim is dismissed for want of jurisdiction.

Although it appears likely, on the basis of Supreme Court and Fifth Circuit authority, that Grand Prairie cannot successfully persuade me that it is entitled to a defense of sovereign immunity, the question of such a municipal claim is one of first impression in OCAHO

jurisprudence, and is not totally free of doubt. Accordingly, as already suggested, I invite Respondent to make a showing of those factors the Fifth Circuit has enumerated as relevant in determining state immunity. Specifically, in the context of the discussion above, Grand Prairie should provide information regarding its funding, autonomy, purview, authority to sue and be sued, and right to hold and use property, and should advise also of Respondent's financial liability, vis a vis that of the State of Texas, when judgment is levied against it. Grand Prairie's response to this invitation will be timely if filed not later than **Monday, December 23, 1996**. Complainant is at liberty to file a reply to Respondent's filing, if any, not later than **Friday, January 10, 1997**.

Unless the filings pursuant to this order provide a predicate for disposition of the case, following the dates set forth, my office will arrange a telephonic prehearing conference in accord with 28 C.F.R. § 68.13. Of course, nothing contained in these instructions as to filing responses to this Order precludes further efforts by the parties to achieve an agreed disposition.

SO ORDERED.

Dated and entered this 2nd day of December, 1996.

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Order To Dismiss in Part and To Inquire Further were mailed first class this 2nd day of December, 1996 addressed as follows:

Counsel for Complainant

Edward B. Klein, Esq.
1620 East Belt Line Road
Suite 201
Carrollton, TX 75006

Counsel for Respondent

Steven R. Alcorn, Esq.
City of Grand Prairie
317 College St.
P.O. Box 534045
Grand Prairie, TX 75053-4045

Office of Special Counsel

James S. Angus, Acting Special Counsel
Office of Special Counsel for Immigration-Related
Unfair Employment Practices
P.O. Box 27728
Washington, DC 20038-7728

Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041

_____

Debra M. Bush
Legal Technician to Judge Morse
Department of Justice
Office of the Chief Administrative Hearing Officer
5107 Leesburg Pike, Suite 1905
Falls Church, VA 22041
Telephone No. (703) 305-0861